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SUGGESTED AMENDMENT TO THE MISSOURI CONSTITUTION

A very important suggestion relative to amending the Constitution of Missouri was made at a meeting of the St. Louis Bar Association, held on the evening of May 5, by the retiring president, Hon. W. L. Sturdevant. It will be recalled that in the recent past a number of proposed amendments to the Missouri Constitution were submitted to the voters, who rejected most of them. These proposed amendments in some instances contained several propositions each, some of which were grouped together rather incongruously so that one objectionable proposition may have caused the defeat of the entire amendment. Mr. Sturdevant refers to this in that portion of his address devoted to this subject, and the defeat of the amendment he refers to was probably due to this fact. We can do no better than quote Mr. Sturdevant, with whom all thoughtful persons must agree:

"There is one other subject to which I call special attention. All the Constitutional Amendments proposed containing anything of much substance were defeated in the election referred to above and in the defeat of these amendments sentiment having been generally cast in favor of their defeat, it can be fairly presumed that a number of the changes proposed, had they stood alone, would have carried. There is one in particular in which I believe that practically all of the people of Missouri would favor if unencumbered with other provisions which they might not approve; this is the amendment proposed in Article 12 of the Bill of Rights pertaining to indictments and informations. This amendment was simple, rational and in accordance with the almost universal belief, not only of the profession and the Courts, but the people generally. In fact, I know not, nor can conceive of any class of people who would oppose it except the criminal class. The amendment and addition of said Section 12 which was proposed read:

" 'That the indictment or information shall be sufficient if it states in plain and concise language the facts constituting the alleged offense.'

"As said Section 12 now stands, an indictment under it is unrelieved in any essential particular from the complicated, confusing and technical requirements of the common law indictment. This is a great handicap to the administration of justice in our criminal courts. It casts a great burden upon prosecuting authorities and the Courts and leads to the escape of the guilty while at the same time it is no protection to the innocent.

"This amendment should be voted on again at the general election this fall. It can be placed upon the ballot by initiative, and if that is done there is every reason to believe it will be adopted by overwhelming vote. At the election on the proposed amendment this amendment had to be voted on in connection with two other separate and distinct propositions, one relating to religious corporations, etc., the other relating to freedom of speech, etc.

"There is another thing to consider in this connection; there was an organized opposition to the amendments as a whole and as to some of them it was a very determined opposition and so the opposition generally to the Constitutional Amendments have had their victory and are not at all likely to organize or take a very decided interest in defeating a single question of this kind, especially one with so much merit and so reasonable in every respect.

"For these reasons I believe the organized Bar of the State ought to lead a movement to bring about this amendment at the coming election."

NOTES OF IMPORTANT DECISIONS.

ACT GIVING SEAMEN RIGHT OF ACTION FOR INJURIES, UPHELD BY U. S. SUPREME COURT.—The Federal Act providing that a seaman suffering injuries in the course of his employment may at his election maintain an action for damages at law, with right of trial by jury, is held to be a valid enactment by the United States Supreme Court, in Panama R. Co. v. Johnson, 44 Sup. Ct. 391, affirming 289 Fed. 964. It is held that the Act is not in contravention of Const. art. 3, § 2, as invading the constitutional admiralty and maritime jurisdiction of the federal courts; the contention that it enables a seaman asserting a cause of action essentially maritime to withdraw it from the region of the maritime law and the admiralty jurisdiction, and have it determined according to the principles of a different system, applicable to a distinct and irrelevant field, and also disregards the restriction in respect of uniformity, being without merit, in view of Const. art. 3, § 1, and art. 1, § 8, Judicial Code, §§ 24, 256 (Comp. St. §§ 991, 1233), and the course of legislation.

We quote briefly from the court's opinion:

"Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in non-maritime service. But, as Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be country wide and uniform in operation. Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts—that is to say, through proceedings in personam according to the course of the common law.

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system.

"The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the maritime law."

LEGAL STATUS OF RENT CONTRACT FOR LAW OFFICE.—A point of interest to the legal profession was recently decided by the Court of Errors and Appeals of New Jersey, in Brigham v. Kidder, 122 Atl. 740. In that case Mr. Kidder, defendant's testator, entered into a contract and lease wih a New York law firm for the use of certain rooms in their suite of offices to be used by him as law offices, and in connection with which Mr. Kidder was also to be furnished with the services of a competent stenographer, law clerk, telephone service, etc. The term was to run from April 15, 1919, to May 1, 1923. The lease was not to be assigned or sublet by Mr. Kidder without the consent of the landlords. The lease did not run in terms to personal representatives. On October 21, 1921, Mr. Kidder died.

The question before the court was whether the contract of lease survived to his personal representative. The Circuit Court held that it did, and gave judgment for plaintiffs. The Court of Errors and Appeals unanimously reversed, on the ground that the renting and contract for services were incident to Mr. Kidder's law business, "and entirely personal," and therefore perished upon his death. The court's reasoning was that a condition was to be implied in the contract that, if performance should become impossible by reason of the perishing of the law practice itself without fault of the parties sought to be charged, no recovery could be had upon the agreement. The court argued further that if Mr. Kidder had intended to bind his estate the lease would undoubtedly have included his executors and administrators.

VIOLENT CONTACT WITH BANKS OF DITCH HELD COVERED BY COLLISION POLICY.—The Supreme Court of Montana, in Power Motor Car Co. v. U. S. Fire Ins. Co., 223 Pac. 112, holds that contact of an automobile with "the body and banks of a ditch" across a highway with such force as to completely wreck it held such a meeting and mutual striking of a moving body with stationary ones, which were visible and tangible things put in the way of some of the senses, as to constitute a "collision" with an "object," within an auto-

mobile collision policy not limiting the collision to one on the highway or restricting the kind of object.

We quote a portion of the court's opinion:

"The decision of the lower court is in harmony with the construction given to the terms of similar policies of insurance by the courts of many other jurisdictions. In the case of Harris v. American Casualty Co., 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846, the facts were that the automobile in crossing a bridge collided with the guard rails and was thrown to the stream below. While these facts differ from those in the instant case, the court in the course of its decision holding the company liable, by way of illustration used the following language:

"'Suppose a person driving an automobile along a road comes to a place where a highway bridge over a chasm had fallen away, and the machine be precipitated to the ground below, can it be said that there could be no recovery under such a policy as is here sued on because the damage to the machine was caused by collision with the flat earth, instead of some upright or perpendicular object on the earth? We think not. To hold that there could be no recovery under such circumstances would be to misconstrue terms of a contract concerning which there is no room for construction, because the meaning is perfectly plain.'

"In Hanvey v. Georgia Life Ins. Co., 141 Ga. 389, 81 S. E. 206, the provisions of the policy of insurance involved were in effect the same as those in this case. The plaintiff alleged in his complaint that the automobile left the roadbed, and after crossing a ditch on the side of the road ran into the embankment on the farther side of the ditch. The court held this sufficient to show a collision within the meaning of the policy, and reversed the decision of the lower court in sustaining a demurrer thereto.

"In Interstate Casualty Co. v. Stewart, 208 Ala. 377, 94 South. 345, 26 A. L. R. 427, an automobile was being driven over a hill; becoming disabled near its top, the driver lost control, and it ran into an embankment outside the road, striking it nearly at right angles. This was held to be a collision, and the company liable for the resulting damage, under a policy the provisions of which were similar to the one upon which this action is based.

"Counsel for appellant cite and rely upon the cases of Wettengel v. United States 'Lloyds,' 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626; Bell v. American Ins. Co., 173 Wis. 533, 181 N. W. 733, 14 A. L. R. 179; Mobald v. Western Indemnity Co., 53 Cal. App. 683, 200 Pac. 750; and New Jersey Ins. Co. v. Young (C. C. A.) 290 Fed. 155. In the first of the above cases the facts were that the automobile was driven off the main road and down a bank of three or four feet into a river, causing the damage. The court construed a provision like the one in this case to mean that the collision which would create a liability under the policy must have been with an automobile, vehicle or other like object, ejusdem generis, and denied recovery.

"In the later case of Bell v. American Ins. Co., the Wisconsin court expressly overruled the doctrine of the Wettengel Case. In the Bell Case the driver had practically stopped his car at the edge of a street, when one side settled into the ground and the car tipped over, causing the damage, and it was held that there was no collision within the meaning of the policy, because the damage resulted from an upset or tip-over, not caused by a collision. Mobald v. Western Indemnity Co. likewise involved damages resulting from a tip-over, which was not caused by a collision.

"The facts in New Jersey Ins. Co. v. Young were that, while the car was being driven along the highway at about 30 miles per hour the front axle broke, causing the broken axle and frame of the car to drop and come in contact with the roadbed, which caused the car to pivot and overturn, with resulting damages. On the theory that the proximate cause of the damage was the breaking of the axle, the court held there was no liability."

POWER OF FEDERAL TRADE COMMISSION TO COMPEL PRODUCTION OF BOOKS AND PAPERS.—A ground must be laid for a demand of the Federal Trade Commission that a private corporation produce certain records, and the demand must be reasonable, and some evidence of the materiality of the papers demanded must be produced, before the corporation can be compelled to comply. The Federal Trade Commission, under Act Sept. 26, 1914, §§ 6, 9, has no power to compel tobacco companies to produce all their books and papers, relevant or irrelevant, including those relating to intrastate business, in order to disclose the possible existence of practices in violation of section 5 (Comp. St. § 8836e), in view of Const. Amend. 4, as the mere fact of carrying on commerce not confined within state lines, and of being organized as a corporation, do not make men's

affairs public, as those of a railroad company now may be.

So held by the United States Supreme Court in Federal Trade Commission v. American Tobacco Co., 44 Sup. Ct. 336. Relative to this question, the court went on to say:

"The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. Smith v. Interstate Commerce Commission, 245 U. S. 33, 43, 38 Sup. Ct. 30, 62 L. Ed. 135. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 14 Sup. Ct. 1125, 38 L. Ed. 1047), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253, and as to correspondence, even in the case of a common carrier, in United States v. Louisville & Nashville R. R. Co., 236 U. S. 318, 335, 35 Sup. Ct. 363, 59 L. Ed. 598. The question is a different one where the state granting the charter gives its Commission power to inspect

"The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery (2d Ed.), § 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. Essgee Co. v. United States, 262 U. S. 151, 156, 157, 43 Sup. Ct. 514, 67 L. Ed. 917. A general subpœna in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. Hale v. Henkel, 201 U. S. 43, 77, 26 Sup. Ct. 370, 50 L. Ed. 652. In the state case relied on by the government, the requirement was only to produce books and papers that were relevant to the inquiry. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658. The form of the subpœna was not the question in Wheeler v. United States, 226 U. S. 478, 488, 33 Sup. Ct. 158, 57 L. Ed. 309."

LIABILITY OF OPERATOR OF BATHING BEACH.—A company maintaining a bathing beach, as provider of accommodations of a public nature for hire, was bound to use reasonable care in furnishing and maintaining the accommodations, and, if by reason of shallowness of water, a diving chute on a raft and the water beneath it were not reasonably safe for diving, it was its duty to warn a bather, as an invitee of the unsafe condition, and it was guilty of negligence if it failed to do so. A sign on a raft maintained by operator of bathing beach, giving notice that bathers used the raft and a diving chute on it at their own risk, though such operator had the right to define its obligation by such a warning sign, did not limit the duty of such operator as to a bather, unless he had knowledge of the sign, and accepted the invitation to use the chute, subject to the absence of any duty to warn of dangers not visible to ordinary inspection, such as insufficient depth of water under chute. Blanchette v. Union St. R. Co., Mass, 143 N. E. 310.

The case of Johnson v. Hot Springs Land & Improvement Co., 76 Or. 333, 148 Pac. 1137, L. R. A. 1915F, 689, differs from the case at bar, in that the plaintiff knew of the depth of water and dived with knowledge of the existing conditions and a realization of the hazards.

The case of Sullivan v. Ridgway Construction Co., 236 Mass. 75, 127 N. E. 543, in its statement of the law resembles Johnson v. Hot Springs Land & Improvement Co., supra, and decides upon the facts of that case that the dangers were obvious and no warning was necessary.

The signs in Bass v. Reitdorf, 25 Ind. App. 650, 58 N. E. 95, relied on by defendant, gave notice that parts of the premises were not usable, and is distinguished from the case at bar, where all the premises were designed for such use as the plaintiff made of them.

DISCIPLINE AND STATE OWNED EDUCATIONAL INSTITUTIONS

By George E. Sloan

A recent decision of the Michigan Supreme Court upholding the expulsion of a girl student for cigarette smoking[1] adds additional weight to the general rule that school authorities in general have practically unlimited power over students under their control so long as they exercise a "reasonable discretion." In practice this means that[2] authorities of both public and private schools have virtually complete sway over their charges, both on and off school property, and that only in the most extreme cases of abuse of power will a court interfere.

Private institutions of learning, even though incorporated, may select those whom they will receive as students and discriminate as they see fit as to sex, age, proficiency in learning, or otherwise.[3] But as most cases of this kind come to the courts from the public school system and state supported colleges and universities we may confine this discussion to those institutions.

The relation between student and college is a contractual one[4] and the rules and regulations of the college as to government and discipline form a part of the contract.[5] One may be a "student" without being matriculated, as where he attends recitations and lectures and is under the government of the institution.[6]

Generally speaking, a public institution cannot make any restrictions, to any extent arbitrary or unfair, upon students who wish to enroll in the institution. A common practice is to charge applicants from outside the state higher fees than students resident within its borders, but further than this it is unwise for trustees to legislate without good cause. As state supported institutions, grade schools, high schools, and colleges are expected to admit all properly qualified applicants unless there is some vitally important reason which makes refusal necessary.[7]

Thus it has been held that a public institution can compel vaccination as a prerequisite to entrance,[8] but trustees cannot make membership in Greek Letter fraternities or other secret societies a disqualification for admission as a student,[9] although trustees may, after admission of such applicants as students, prohibit their active connection with such societies if it "tends to any material degree to interfere with the proper relations of the students to the University."[10]

Once admitted as a student, the individual is, one might almost say, at the mercy of the school authorities.

"The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted is quite another thing.

"The first rests upon well established rules, either prescribed by law or sanctioned by usage, from which the right of admission is to be determined. The matter rests largely in the discretion of the officers in charge, the regulations prescribed for that purpose being subject to modification or change from time to time as supposed emergencies may arise.[11]

Stated another way,

"The proper authorities of a college or university may make reasonable rules and regulations for the government and discipline of the students[12] so long as they do not interfere with some positive right."[13]

(1) The Alice Tanton case, discussed post. Not yet reported.

(2) 24 R. C. L. 574.

(3) Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589. See also 24 L. R. A. (NS) 447.

(4) Booker v. Grand Rapids Medical College, supra. See also 11 C. J. 997.

(5) State Univ. v. Waugh, 105 Miss. 623, 62 S. 827, L. R. A. 1915D 588.

(6) Morse v. State 6 Conn. 9.

(7) The state supported institution is, therefore, under an obligation which does not affect private schools.

(8) 23 Cal. A. 619, 138 Pac. 937.

(9) State v. White, 82 Ind. 278, 42 Am. R. 496.

(10) State v. White, supra.

(11) Ibid.

(12) North v. State University, 137 Ill. 296, 51 L. R. A. (NS) 17. (Chapel exercises.)

(13) State v. Schauss, 23 Ohio Cir. Ct. 283. See also U. S. v. Georgetown College, 28 App. D. C. 87. (Dictm.)

"Within reasonable limits, the power of the trustees is plenary and complete,[14] and "unless such rules are unlawful, or against public policy the court will not interfere or revise them,[15] nor will they afford relief in case of their enforcement unless those whose duty is to enforce them act arbitrarily, and for fraudulent purposes."[16]

The wisdom of the policy manifested by the rules and regulations is a matter within the discretion of the college authorities and beyond interference by the courts.[17]

"While the relations between college and student are contractural, thus precluding an arbitrary refusal to permit further attendance, yet the power of suspension or expulsion of students is an attribute of government of such institutions"[18] with which, except in extraordinary cases, the court will not interfere.[19]

But a college cannot dismiss a student without giving him a hearing with a lawful form of procedure, notice of the charge, and opportunity to hear testimony against him, question witnesses, and rebut evidence.[20]

Law student dropped from school for deficient marks and insubordination ordered readmitted.[21]

A student wrongfully dismissed is entitled to reinstatement, since an action for breach of contract would not afford adequate relief.[22]

SOME ILLUSTRATIONS

It can easily be seen that there is a vast difference in the power and authority of a school or college over its enrolled students and those desiring that privilege.

(14) State v. White, supra.

(15) Kentucky Military Institute v. Bramblet, 158 Ky. 205, 164 S. W. 808.

(16) Ibid.

(17) Gott v. Berea College, 156 Ky. 376, 161 S. W. 204, 51 L. R. A. (NS) 17, State v. Schauss, 23 Ohio Cir. Ct. 283.

(18) 6 A. L. R. 1533

(19) Koblitz v. Western Reserve University, 21 Ohio Cir. Ct. 144, 11 Ohio Cir. Dec. 515, and supra.

(20) Gleason v. State University, 104 Minn. 359, 116 N. W. 650.

(21) Comm. v. McCauley, 3 Penn. Co. 77.

(22) Baltimore College v. Colton, 98 Md. 623; 57 A. 14; 64 L. R. A. 108; Gleason v. State Univ. supra.

It has been held, for instance, that students may be required to procure and wear a prescribed uniform,[23] to make a deposit for possible damage to property,[24] to attend religious exercises unless excused,[25] to refrain from hazing,[26] or from entering restaurants or eating houses not controlled by the college,[27] or joining fraternities.[28] It has also been held within the power of a school board to make and enforce a rule requiring high school students to study music,[29] and to prohibit the playing of football.[30]

But a college cannot demand a fee for Y. M. C. A. or Y. W. C. A.,[31] nor demand a $5 fee for the use of its library.[32] It has also been held unreasonable to deprive a student of her diploma for refusal to wear a cap or gown,[33] or to refuse a graduate a transcript of her records while in school..[34]

AUTHORITY OUTSIDE THE SCHOOL

In the Dresser case,[35] where some children had taken a poem, written by a senior, to the local paper and the owner, deeming the poem an innocent "take-off" on the rules of the school, published parts of it, the question arose as to the ability of school authorities to punish the children for an act done outside of school property, and outside of school hours. The court, speaking through Bashford, J., said:

"It is clear that a rule might have been

(23) Connell v. Gray, 33 Okla. 591, 127 Pac. 417, Ann. Cases, 1914B, 399, 42 L. R. A. (NS) 336.

(24) Connell v. Gray, supra.

(25) North v. State Univ. 137 Ill. 296, 27 N. E. 54.

(26) Kentucky Military Institute v. Bramblet, 158 Ky. 205, 164 S. W. 808.

(27) Gott v. Berea College, 156 Ky. 376, 161 S. W. 204, 51 L. R. A. (NS) 17.

(28) State v. White, 82 Ind. 278, 42 Am. R. 496; People v. Wheaton College (a privately owned institution), 40 Ill. 186; State Univ. v. Waugh, 105 Miss. 623, 62 S. 827, L. R. A. 1915D 588.

(29) State ex rel. Andrews v. Webber, 108 Ind. 31.

(30) Kinzer v. School District, 129 Iowa 441.

(31) Connell v. Gray, supra.

(32) State ex rel. Little v. University of Kansas, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378.

(33) Valentine v. School District, 187 Iowa 555, 174 N. W. 334, 6 A. L. R. 1525.

(34) Ibid. The garments had been recently fumigated, and it was reasonable to suppose that compliance with the demands of the school officers would render the plaintiff liable to disease.

(35) State ex rel. Dresser v. District Board, 135 Wis. 619.

adopted by the school authorities to meet the situation here presented. This court * * * recognizes certain obligations on the part of the pupil which are inherent in any proper system, and which constitute the common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject.

"This court therefore holds that the school authorities have the power to suspend a pupil for an offense committed outside of school hours and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the school room, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt. Such power is essential to the prevention of order, decency, decorum, and good government in the public schools.

"This court is not called upon to decide as to the wisdom of the action of the school authorities but only as to their jurisdiction within proper limits."

This view is re-enacted by that of Wilson v. Board of Education,[36] where the court upheld a rule of the school board prohibiting members of high school fraternities from participating in school activities and four minors, members of Phi Sigma high school fraternity at Hyde Park High School, brought suit against the board because of this "discrimination." While the school board was held unable to deny the fraternity members their right to attend school, the court did say that participation in the various activities, such as debating, athletics, etc., were privileges which could be revoked and denied because of violation of the board's rule against joining secret organizations. Said the court:

"The rules and the by-laws necessary to a proper conduct and management of the schools are, and must necessarily be, left to the discretion of the board, and its acts will not be interfered with, nor set aside by the courts unless there is a clear abuse of the power and discretion conferred. Acting reasonably within the powers conferred, it is the province of the Board of Education to determine what things are detrimental to the successful management and good order and discipline of the schools and the rules required to produce these conditions."

The high school fraternity question also came up in Wayland v. Hughes,[37] a Washington case, where it was held that the rule prohibiting members of the Gamma Eta Kappa high school fraternity from all privileges, save that of attending classes, was valid and that publication of a defiant chapter letter in their national magazine showed insubordination.[38]

In the recent case of Finch v. Fractional School District, No. 1,[39] the Michigan court had to pass upon the finality of a decision of a school board finding a teacher guilty of gross immorality, Speaking through the Chief Justice it was said:

"The school board, a deliberative public body in the exercise of a right, here reserved by contract, went to a hearing, quasi-judicial in character, and, having grounds to sustain its findings, found that plaintiff had been guilty of gross immorality and dismissed him. Surely, the school district may not be required to accept the finding of a jury upon this question rather than the finding of the school board. If such finding by the school board may be reviewed and reversed by a jury, the government of our schools may be impaired and the position of the school boards in dealing with such cases will be precarious, indeed. Such finding and determination of the board are conclusive unless the board acted corruptly, in bad faith, or in clear abuse of its powers."

(36) 233 Ill. 464.

(37) 43 Wash. 441.

(38) As to college fraternities see: State v. White, 82 Ind. 278. 42 Am. R. 496; Gott v. Berea College, 156 Ky. 376, 161 S. W. 204; People v. Wheaton College (private institution), 40 Ill. 186; Miss. Univ. v. Waugh, 105 Miss. 623, 62 S. 827, 51 L. R. A. (NS) 17; L. R. A. 1915D 588.

(39) Mich.

FREEDOM OF SPEECH

The situation of a student expelled for anarchistic or otherwise forbidden views aired in public may be illustrated by the late case of People v. Albany Law School.[40] A member of the senior law class at Albany Law School, expelled by the faculty for expressions of an unpatriotic and revolutionary nature, applied for a writ of mandamus to compel his reinstatement. On appeal the application was denied. Judge Henry T. Kellogg, who wrote the opinion, saying:

"It is not the office of a writ of alternative mandamus to effectuate a redetermination by a court of facts relating to the conduct of an expelled student, when such facts have already been decided against the student by the faculty of a school having jurisdiction. Its only function is to determine disputed facts, upon which the rightful exercise of such jurisdiction may depend. In this case it is not in dispute that on many occasions the petitioner gave expression to views which were unpatriotic, revolutionary, and anarchistic; that these expressions were known to the faculty of the Albany Law School; that they constituted in part the grounds of their decision in favor of his expulsion. Clearly, therefore, the faculty acted within the scope of its jurisdiction, and exercised its discretion in a matter involving discretion, to such purpose that no review thereof may be made by a court."

RELIGIOUS QUESTIONS

The religious question is one which has been the source of much bitter controversy. The recent Oregon parochial school law, now before the Supreme Court, has its forerunner in the famous Pennsylvania case of Hysong v. School District.[41]

In the Hysong case a Catholic school board, in a community preponderately Catholic, appointed six out of eight teachers from a religious order known as Sisters of St. Joseph. Of the various charges made in the resulting suit, it was proved that the Sisters wore the robes of their order at all times, that the children were instructed to address them as "Sister" and visiting priests as "Father," that all Catholic pupils were expected to stay after school and recite their catechism, which they often studied during school hours, that one of the two pianos in the school[42] was used for private instruction by Sister Mary John after school hours, and that they stayed at, and took orders from, the "Mother-House" of their order. Teaching of the catechism in the public school building was restrained, as was the use of the piano for private gain, but no objection was found to the employment of the Nuns, the wearing of their distinctive robes in the class-room, or the instructions to the children to call them "Sister" and priests, "Father."

Mr. Justice Williams dissented, saying:

"With faces averted from the world they have renounced; wearing their peculiar robes which tell of their church, their order, and their subordination to their ecclesiastical superiors; using their religious names and addressed by the designation of 'Sister,' they direct the studies and deportment of the children under their care as ecclesiastical persons. They cannot, or they will not, attend teachers' institutions. They have no touch with those engaged in the same pursuit about them. They do not attend public examinations; but, examined in the seclusion of the 'Mother House' of their order, after having been selected by the 'Sister Superior' in compliance with the written request of the directors, they come to their work as a religious duty, and their wages pass, under the operation of their vows, into the treasury of the order. If a school so conducted is not dominated by sectarian influence and under sectarian control, it is not easy to see how it could be"

The Sisters of St. Joseph also figured in the New York case of O'Connor v.

(40) 191 N. Y. Supp. 349.
(41) 164 Pa. St. 629.
(42) Owned by the Sisterhood.

Hendricks.[43] The O'Connor case, however, held that the State Superintendent of Public Instruction could prohibit the wearing of religious garb, and that failure to obey his order forfeited any further salary because the influence of such apparel is distinctly sectarian.

Creyhon v. Board of Education,[44] held that graduates of parochial schools could be compelled to take examinations to enter High School even when they, to the satisfaction of the court, had been shown to have done the same work as done in the public schools, whose graduates were admitted without examination by statute.

"The determination of the matter is a function of the school authorities, and its correctness, if arrived at by the exercise of their fair and candid judgment, is not open to judicial review."[45]

McCormick v. Burt[46] held that a public school teacher was not liable in damages for expelling one Edward McCormick, a member of the Catholic Church, for refusing to stop studying while she read the bible for fifteen minutes as required by the school board, on the grounds that she was merely carrying out orders of her superiors and acted without malice.

THE MICHIGAN CASE

The newest capstone on this phase of our public law is the case of "Alice Tanton, by Dorothy Tanton, her next friend, v. Charles McKenney, President, and Bessie Leach Priddy, Dean of Women, of the Michigan State Normal School," recently argued before the entire bench of the Michigan Supreme Court.

Alice Tanton, eighteen years old, was one of the seventeen co-eds expelled from the Michigan State Normal College at Ypsilanti, Mich., in the spring of 1922, for alleged "social indiscretions." The principal charge against Miss Tanton was that of cigarette smoking. She first learned of the school's action when her father cut off her allowance, following the receipt of a notification from Mrs. Priddy that his daughter had been barred from the college.

An appeal for reinstatement failing, Miss Tanton began mandamus proceedings in the Washtenaw County Circuit Court, where the case came before Hon. George W. Sample, Circuit Judge, in September, 1922. Her petition for a writ of mandamus was denied. Miss Tanton's attorney charged that the school authorities sought to set up a double standard, and were seeking "to make a requirement of girls that they do not make for boys." The appeal was heard on January 9, 1924, and the decision, written by Fellows, J., handed down March 5, 1924.

The trial judge found the facts to be that:

"Plaintiff (Miss Tanton) had become addicted to the smoking of cigarettes before coming to the institution and continued their use there; that she smoked cigarettes on the public streets of Ypsilanti; that she rode around the streets of Ypsilanti seated on the lap of a young man and that she was guilty of other acts of indiscretion; and that she aired her grievances and her defiance of disciplinary matters in the public press."

The court made short work of counsel's claim of error because he was not allowed to introduce evidence that some male students and professors at the University smoked, saying:

"This testimony was rejected by the trial judge, and correctly rejected. The rules of discipline at the University might be entirely inappropriate for an institution having as students over fourteen hundred young girls of tender years. This brings us to the meritorious questions of whether defendants have the power here exercised and whether there has been an abuse of such power."

It was found that:

"There has been no abuse of discretion,

(43) 184 N. Y. 421.

(44) 99 Kan. 824.

(45) It is only fair to point out, however, that graduates of parochial schools here were held eligible for admission to high school without examination because the school authorities themselves had admitted them to be as well prepared as the public school children.

(46) 95 Ill. 263.

no arbitrary action on the part of the defendants or either of them."

The mere fact that Miss Tanton ran to the newspapers with her troubles, in the view of the court,

"of itself was sufficient grounds for refusing her readmission"[47] and a rather high compliment was paid Mrs Priddy, now Dean of Women at the University of Missouri, when the court says:

"Instead of condemning Mrs. Priddy she should be commended for upholding some old-fashioned ideals of young womanhood."

The fact that Miss Tanton was attending a state normal college may have caused the court to regard her conduct with more severity because:

"As is well known, the Michigan State Normal College is maintained at the expense of the tax-payers to prepare teachers for our public schools. The student body is made up almost entirely of young women who have chosen teaching as their profession. They are required to sign a 'Declaration of Intention' couched in the following language:

" 'We, the subscribers, do hereby declare that it is our intention to devote ourselves to the business of teaching in the schools of this state, and that our sole object in resorting to this normal school is the better to prepare ourselves for the discharge of this important duty.' "

Ruling Case Law is quoted by the Court:

" * * The courts are usually disinclined to interfere with regulations adopted by school boards, and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board."

" * * The presumption is always in favor of the reasonableness and propriety of a rule or regulation duly made. The reasonableness of regulations is a question of law for the courts."[48]

The Dresser,[49] Wilson,[50] and Pugsley[51] cases are quoted, together with the recent case of Finch v. Fractional School District,[52] a Michigan case. The Dresser case[53] is authority for the rule that:

"School authorities have the power to suspend a pupil for an offense committed outside of school hours and not in the presence of the teacher, which has a direct and immediate tendency to influence the conduct of other pupils while in the school room," or "to set at naught the proper discipline of the school."

The Wilson case[54] says that:

"The rules and by-laws necessary to the proper conduct and management of the schools are, and necessarily must be, left to the discretion of the board and its acts will not be interfered with nor set aside by the courts unless there is a clear abuse of the power and discretion conferred."

And the Pugsley case, as we have seen, says that:

"The question, therefore, is not whether we approve this rule as one we would have made * * * nor are we required to find whether or not it was essential to the maintenance of discipline."

In other words, the Arkansaw court will allow school masters to make ANY rule, "unless we find that the directors have abused their discretion, and that the rule is not one reasonably calculated to effect the purpose in the school."

Whether or not one agrees that an eighteen-year-old girl should be expelled from school, with the lifelong stigma that necessarily attaches to such a fate, merely because she used powder on her face, it does seem that the Arkansaw court has

(47) Wayland v. Hughes, 43 Wash. 441, was cited for this proposition. It would seem, however, that Wayland v. Hughes, discussed supra, might be distinguished upon the ground that there is a difference between writing a chapter letter for the national publication of a secret fraternity and medium of the press.

(48) 24 R. C. L. 575.

(49) State ex rel. Dresser v. District Board, 135 Wis. 619.

(50) Wilson v. Board of Education, 233 Ill. 464.

(51) Pugsley v. Sallmeyer, 158 Ark. 247, 250 S. W. 538.

(52) —— Mich. ——, discussed supra.

(53) Discussed supra.

(54) Discussed supra.

gone a long way when they hand down a decision as sweeping in its terms as this one. It would seem that the rule has been broadened to such an extent that it is of little practical value to possible petitioners.[55]

Granting that the circumstances in this particular Michigan case warranted the dismissal of Miss Tanton, and that the procedure was proper and regular, does it not seem that by adopting the sweeping statements of the Pugsley case the Michigan court has broadened the rule of "discretion" to such an extent that it is of little real value to students seeking relief in the future?

WHAT IS "REASONABLE?"

That school authorities have, and must have, wide discretionary powers to conduct their duties properly will be readily admitted, but it is the "extreme" cases that bring up the question "What is 'reasonable' discretion?"

In referring to the Pugsley case Justice Fellows says:

"In that case petitioner had been expelled for the violation of a rule against the use of cosmetics. In denying the writ of mandamus to compel her reinstatement it was said:

" 'The question, therefore, is not whether we approve this rule as one we would have made as directors of the district, nor are we required to find whether or not it was essential to the maintenance of discipline. On the contrary, we must uphold the rule unless we find that the directors have abused their discretion, and that the rule is not one reasonably calculated to effect the purpose in the school; and we do not so find. * * *

" 'Courts have other and more important functions to perform than that of hearing the complaints of disaffected pupils against the rules and regulations promulgated by the school boards for the government of the schools. The courts have this right of review, for the reasonableness of such a rule is a judicial question and the courts will not refuse to perform their functions in determining the reasonableness of such rules, when the question is presented. But in so doing it will be kept in mind that the directors are elected by the patrons of the schools over which they preside, and the election occurs annually. These directors are in close and intimate touch with the affairs of their respective districts and know the conditions with which they have to deal. It will be remembered also that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the school room is an appropriate place to teach that lesson; so that the courts hesitate to substitute their will and judgment for that of the school boards which are delegated by law as the agencies to prescribe rules for the government of the public schools of the state, which are supported at public expense."

The facts of the Pugsley case were these:

On the opening day of school, in September, 1921, N. E. Hicks, the principal, read certain rules which had been adopted by the Board of Directors and announced that observance of them would be required of all pupils. Among these rules was number three, which reads as follows:

"The wearing of transparent hosiery, low-necked dresses, or any style of clothing tending toward immodesty of dress, or the use of face paint, or cosmetics, is prohibited."

Appellant, Miss Pearl Pugsley, came to school with powder on her face, which the teacher compelled her to wash off, and was told that she could not return to school with powder on her face. Miss Pugsley refused to submit to the condition imposed and started suit to compel her admittance to the school.

Justice Hart, whose dissenting opinion

(55) The authority of the Pugsley case is weakened by the fact that it was really nothing more than a three to two decision. See discussion post.

follows, seems to take a more reasonable view of the squabble. He wrote:

"Miss Pearl Pugsley was eighteen years old on the 15th of August, 1922. I think a rule forbidding a girl of her age from putting talcum powder on her face is so far unreasonable and beyond the exercise of discretion that the court should say that the Board of Directors acted without authority in making and enforcing it. 'Useless laws diminish the authority of necessary ones.' The tone of the majority opinion exemplified the wisdom of this old proverb.[56]

It is also well to note that Justice Humphries concurred only because:

"A proper showing has been made to this court that the rule complained of was rescinded after this appeal was perfected. The question is therefore moot.[57]

That the Michigan court would go so far as to hold that it was within the "discretion" of a school board to refuse an eighteen-year-old girl admittance to a public high school simply because she put talcum powder on her face is doubtful.[58] But at all events, the Michigan court has placed itself squarely behind the rule that school authorities have unlimited power over their students, both in and out of the class-room, and may make and enforce any rules or regulations that they see fit to promulgate without interference from the courts save where such rules or orders are "unreasonable." In short, school authorities are bound only by the "Rule of Reason," and in the determination of what is "reasonable," the courts, at least in Michigan, will not interfere with the acts of school boards or administrative heads unless "there is a clear abuse of * * * discretion, or a violation of law."[59]

(56) We will not annul a rule of the kind unless a valid reason for doing so is made to appear, whereas, to uphold it we are not required to find a valid reason for its promulgation. Majority opinion (at page 254).

(57) There are five members of the court.

(58) See Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589.

(59) 24 R. C. L. 575.

MASTER AND SERVANT—SALESMAN ON COMMISSION

DARE v. BOSS

224 Pac. 646

(Supreme Court of Oregon, April 8, 1924)

In an action for injuries sustained by plaintiff when struck by an automobile being demonstrated by a salesman to a prospective purchaser, whether the relation of master and servant existed between the salesman and defendant held for the jury.

Action by James C. Dare against C. L. Boss and R. J. McRell, partners, doing business as the C. L. Boss Automobile Company, and Sam Little, and another. Judgment for plaintiff, and named defendants appeal. Reversed, and new trial directed.

This is an action brought to recover of the defendants on account of injuries received in a collision with an automobile driven, as alleged, by defendant company's agent, and the substance of the complaint is as follows: It is charged that defendant Sam Little, as an employee of the defendant company, among other duties he performs, acts as salesman in the disposal of automobiles and takes prospective buyers out who desire to purchase automobiles and demonstrates the qualities of the automobiles which the defendant company is engaged in selling. It is alleged that Pridgeon was a prospective purchaser of an automobile from the defendant company, or that he was in the employment of the company, the exact nature of their relationship being unknown to plaintiff. In a separate paragraph it is alleged that at the time of the injury set forth in the complaint defendants Little and Pridgeon were the employees and agents of the Boss Automobile Company and that all of the acts set forth in the complaint were done for the Boss Automobile Company and done as agents and employees thereof. It is further alleged that on the 16th day of July, 1921, plaintiff was driving southerly towards Portland on the Portland and Astoria Highway in his automobile and when at a distance of probably a mile north of Linnton he met with an accident which compelled him to stop his machine to make repairs thereon; that for the purpose of making the repairs he pulled his automobile to the west side of the road as far as the condition of the highway would permit, and his automobile was so situated that any person approaching from

either direction could readily see it for a distance of several hundred feet; that it was dark and plaintiff had his lights burning in both the front and rear of his machine and was in front of it, making the repairs, and his family was seated in the automobile, when the defendants Little and Pridgeon, traveling south, approached plaintiff's automobile from the rear, traveling carelessly and negligently at a speed of from 35 to 40 miles an hour, and under the influence of liquor, and carelessly and negligently ran against and into plaintiff's automobile from the rear, damaging it and forcing it forward, causing it to run over plaintiff and injuring him to such an extent that in the future he will not be able to follow his usual vocation as a mechanic. Plaintiff then sets forth his earning capacity and a further description of his injuries, which are not material here.

Sam Little answered, admitting that there was a collision on the highway near Linnton about the 16th day of July, 1921, between the car driven by defendant Pridgeon and the car of plaintiff, and admitting that as a result of the accident plaintiff received some injuries, but denied all of the other allegations of the complaint. For a further answer defendant Little alleged: That on or about July 16, 1921, defendant Pridgeon was driving an automobile south on the Portland and Astoria Highway, about a mile or a mile and a half north of Linnton, and that prior thereto plaintiff had, for some reason unknown to defendant, parked his car on said road, facing south, but so parked that one-half thereof was standing on the traveled portion, or hard-surfaced portion, of the main highway; that said highway is one ordinarily congested with traffic and was congested at the time of the accident; that it was quite dark and that plaintiff had parked his car on the traveled portion of the highway without any lights, or lights sufficient to be seen, in such a manner as to make it dangerous for traffic on the road; that the car driven by Pridgeon, in which Little was riding, was being driven slowly and that both Pridgeon and Little were giving due and reasonable attention to the traffic on the road when they came suddenly upon plaintiffs automobile, parked as alleged in the answer, and that before Pridgeon could stop the car he was driving it collided with the car of plaintiff, causing the accident; that plaintiff was guilty of gross carelessness, recklessness, and negligence in that, although he knew said road was congested with traffic, he left his automobile parked so that a portion of it was upon the main traveled portion of the highway, and that plaintiff's automobile was left without any rear light or any light sufficient to permit Pridgeon or Little to see any car in the road—all of which negligence of plaintiff contributed to the accident; that plaintiff could have prevented the accident by moving his car off the traveled portion of the highway and could have moved it to some place where the road was wide enough so that he could have parked it entirely off of the main traveled portion of the highway, and that plaintiff's automobile was not so disabled prior to the accident as to prevent it from being moved.

The defendants C. L. Boss and R. J. McRell answered and admitted that Little was an employee of the Boss Automobile Company and that the collision occurred on the date mentioned in the complaint between the car driven by defendant Pridgeon and the car driven by plaintiff, and admitted that plaintiff was injured, but denied all of the other allegations of the complaint. For a further and separate answer to the complaint they alleged substantially the same defense of contributory negligence as that of defendant Little. Pridgeon answered, setting up practically the same defense of contributory negligence of plaintiff as in the answer of the other defendants.

On the trial the plaintiff introduced evidence tending to support the allegations of the complaint that the car driven by Pridgeon had a dealer's license of the defendant company upon it, and also declarations of members of the defendant company that Little was employed by the company and was engaged in demonstrating the car for the company, with a view of a sale to Pridgeon, and, in addition to this, introduced evidence of the drunkenness of Little and Pridgeon and of the fact that they were driving at a high rate of speed—sufficient, if uncontradicted, to have made a prima facie case against the defendants.

Plaintiff's testimony tended to show that at the date of the accident he was driving south on the main highway between Scappoose and Portland when one of his tires was punctured and that he drew up as near the west side of the highway as he deemed safe, leaving the wheels on the east side of his car from 18 to 20 inches upon the hard surface, and was engaged in repairing the puncture when the car occupied by Pridgeon and Little and driven by Pridgeon crashed into him, occasioning the injuries, the seriousness of which is not substantially disputed. The plaintiffs testimony is

to the effect that one of the front tires of his car was so flattened as a result of the puncture that it would have been dangerous for him to have driven further with it in that condition and that he stopped his car as far off the road as appeared safe to him, and that there was ample space for the car occupied by Pridgeon and Little to have passed him without injury.

Plaintiff testified that the taillight on his machine was burning brightly, so that defendants Pridgeon and Little could have seen it, had they been careful; they being headed in the same direction as the car of plaintiff.

The case was submitted to the jury by agreement of counsel with instructions to bring in a sealed verdict. Among other forms of verdicts submitted to the jury was one against all of the defendants. When the verdict was opened the next day, and after the jury had dispersed, it was found that the name of Pridgeon had been erased, leaving a verdict against the defendants Boss, McRell and Little, and no affirmative verdict either way as to Pridgeon. Thereupon the defendants moved that the court enter judgment in favor of all the defendants, which motion was overruled, and the court entered a judgment in favor of plaintiff and against the defendant company and Little and in favor of Pridgeon, dismissing as to him. At various stages of the case there were motions for non-suit and directed verdict, which it is not necessary to set forth further in this case.

H. B. Beckett, of Portland (Wilbur, Beckett & Howell and John F. Logan, all of Portland, on the brief), for appellants.

P. J. Bannon, of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1, 2] The testimony as to Little's exact status in the company is very contradictory. A written contract between the defendant company and Little was introduced, which upon the face of it shows that he was employed to sell cars upon a commission; the company being under obligation to furnish him with gasoline and such things as he required, but not obligating the company, so far as it appears, to furnish him with a car. The testimony indicates that he was not to receive any compensation excepting on the condition of making a sale. There is further testimony to the effect that the company did not profess to direct his movements while he was engaged in demonstrating, and that, with the exception of acting as a salesman on a commission, the company exercised no control over his movements. But the written contract is not, as between the company and the plaintiff here, conclusive, however strong it might appear to a person simply depending upon it for information as to the status of the parties. The fact that Pridgeon was driving a car with a dealer's license on it in the name of the defendant company, and the alleged admissions testified to by members of the company that Little was demonstrating for them, are some evidence connecting the company with the ownership of the car and tending to indicate the relationship of master and servant between the parties. However weak this testimony may seem to us, it was sufficient to go to the jury, and we think the motion for non-suit upon this ground was properly overruled.

(3, 4) The objection that plaintiff was guilty of contributory negligence, as a matter of law, while plausible, cannot be sustained. Section 19, c. 371, of the General Laws of Oregon for 1921, at page 712, contains the following clause:

"* * * * No vehicle shall be parked upon the main-traveled portion of the highways of this state; provided, that this shall not apply to any vehicle so disabled as to prohibit the moving of the same."

We find no definition in the statute of the word "park," but we take it that it means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. Neither do we understand this statute to require a person to incur any chances of any serious injury by removal of a disabled car; but in such case, if the testimony indicates that such removal would incur danger to the person occupying the car, there is no hard and fast rule requiring him to take such chances. The "rule of reason" applies here, and if it should have appeared to the jury that he could have moved the car safely he would have been guilty of contributory negligence in failing to do so, but unless the testimony is uncontradicted the court should not hold that stopping to repair a temporary disability is contributory negligence as a matter of law, and especially is this true in a case where it appears from the plaintiff's evidence that the party injured had left ample room to pass and by his lights had given ample warning so that there could be no plausible excuse for running into him. We do not think, as a matter of law, the court could say to the jury that the plaintiff was guilty of contributory negligence, but properly left it to the jury to find on this subject.

(5) But there is one proposition that makes it necessary to reverse this case, and that is the fact that the jury, in effect, has found

Pridgeon, who was driving the car by permission of Little, not guilty of negligence in crashing into plaintiff's car, or at least has failed to find on that subject. There could be no negligence except that imputed from the relationship of the parties, and, unless Pridgeon was negligent, no negligence could, under any circumstances, be imputed to the defendant company. That is to say, if the collision was without negligence on the part of the driver of the car, it could not be negligence on the part of any one else. To say that Pridgeon was not negligent is to say that nobody in charge of the car was negligent, because it was his hand steering the car, and whatever injury occurred, if any, for which anybody was liable, must have been through his agency, and this is sustained by all of the authorities. Childress v. Lake Erie, etc., R. C., 182 Ind. 251, 105 N. E. 467; Webster v. Chicago, St. P. M. & O Ry. Co., 119 Minn. 72, 137 N. W. 168; Rathjen v. Chicago, B. & Q. R. Co., 85 Neb. 808, 124 N. W. 473; Loveman v. Bayless, 128 Tenn. 307, 160 S. W. 841, Ann. Cas. 1915C, 187; Emmons v Southern Pacific Co., 97 Or. 263, 298, 191 Pac. 333.

For this reason the judgment of the circuit court is reversed and a new trial is directed.

NOTE—*Salesman on Commission as Servant of Employer.*—The relation was held to be properly found to exist between an automobile sales concern and a salesman employed on a commission basis, there being evidence that the salesman was permitted to take out a car for demonstration only upon orders of the general manager, who in the instant case gave the salesman instructions about the time he should return, and that defendant retained full authority to control the sales. Hoffman v. Liberty M. Co., Mass., 125 N. E. 845.

Where a salesman was "expressly authorized" by a company to demonstrate and sell automobiles for it on commission, and while returning to its place of business after having finished a demonstration, he negligently ran into and damaged the plaintiff's machine, it was held that the company was properly held liable. "The driver was acting with the authority of the defendant and for its interest and benefit, and the fact that his compensation lay by way of commissions on the sale rather than by the day or week, is immaterial." Long Ben v. Eastern Motor Co., N. J. L., 109 Atl. 286.

A salesman of automobiles, employed on a commission basis, subject only to the rules of the company in regard to representations of its cars, was held not to be a servant, but an independent contractor. Barton v. Studebaker Corp., Cal. App., 189 Pac. 1025.

Even though an automobile company entered into an arrangement with another whereby the latter was to receive a commission on sales of automobiles made by him, such arrangement leaving the time, manner and method of making such sales to said person, with no right in the company to in any way manage, direct or control him in making sales, the relation of master and servant did not exist between them. Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N. E. 645.

Where one had possession of an automobile under an oral agreement of purchase, and was using the car in an attempt to effect sales of automobiles for the owner on commission, he not being subject to the owner's orders or directions, was not a servant of the owner, and the latter was not liable for his negligence. Goodrich v. Mustgrave F. & A. Co., 154 Ia. 637, 135 N. W. 58.

CORRESPONDENCE

San Francisco, May 27, 1924.

Gentlemen:

We have received your May 20th issue in which you review the New Edition of Jones' Evidence.

We want to thank you sincerely for this splendid review, but wish to call attention to a misprint in the third paragraph which reads as follows: "Nearly twenty pages have been added." We are quite sure you intended to say nearly two hundred pages or more have been added.

As a matter of fact, the New Edition of Jones' Evidence contains two hundred and eighty odd pages more than are contained in the previous edition, and a proper statement to make would be that the New Edition contains about twenty-five per cent more matter than the previous edition. While it is true there is an increase of but two hundred and eighty odd pages, yet a typed page of the New Edition contains about five per cent more matter than a typed page of the previous edition, so there is approximately twenty-five per cent increase in this edition over the previous one.

Yours very truly,

BANCROFT-WHITNEY COMPANY.

Lawyer: "Well, shall we take the jury as it stands?"

The Accused: "Better fire the married woman, counselor. They always convict on the slightest circumstancial evidence."—Boston Globe.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Admiralty**—Workmen Compensation.—Injuries received in either a floating dry dock or in a dry dock affixed to the land, both designed to receive vessels floating in navigable waters, are not covered by the Workmen's Compensation Act, the employees at the time of the injury being engaged in working on completed vessels in dry dock for repairs and repainting; admiralty jurisdiction being exclusive.—O'Hara's Case, Mass., 142 N. E. 844.

2. **Auctions and Auctioneers**—Private Property.—A municipal ordinance, providing "the crying of goods, wares or merchandise for sale by auction, or auctioneering, in or on any public place, building or land, the customary or usual passageway into which place, building or land opens or extends immediately into any street or other public way, * * * is hereby declared unlawful and is hereby positively prohibited," if deemed to prohibit the holding of an auction in a private building opening upon a street, held an unauthorized prohibition of the business of auctioneers, rather than a regulation thereof, as authorized by Rev. St. art. 858, and an unreasonable limitation upon the use of private property.—Ex parte Manor, Tex., 258 S. W. 1063.

3. **Automobiles**—Authority to Drive.—Where the owner of an automobile had never given a stepson permission to use it prior to time of the collision, the fact that stepson 28 years of age roomed and boarded at the owner's home, and was engaged in his own business, did not bring him within the so-called family rule in such a case as to make the owner liable for the unauthorized act in driving the car at the time of the collision.—Mooney v. Canier, Iowa, 197 N. W. 625.

4.——Authority to Drive.—In action for injuries to pedestrian by automobile, jury held not bound to give credit to testimony of the master and servant that the servant was driving the automobile without authority, even though uncontradicted.—McDonough v. Vozzela, Mass., 142 N. E. 831.

5.——Traffic Officers.—Motor Vehicle Act, § 30, in providing for the appointment of such number of traffic officers as the chief of the motor vehicle division may deem necessary, and the fixing of the salaries thereof by the boards of supervisors of the various counties in connection with the chief of the motor vehicle department, and in further providing that the amount of the salary shall be fixed by contract, held not an unwarranted delegation of legislative power, and so violative of Const. art. 3, § 1.—Ryan v. Riley, Calif., 223 Pac. 1027.

6. **Bailment**—Parking Automobiles.—A transaction whereby, in consideration of 50 cents, plaintiff secured the privilege of parking his car in defendant's parking place, which was inclosed by an 8-foot fence, with an entrance and exit and an attendant on duty at all times, held to impose on defendant the liability of a bailee for hire.—Galowitz v. Magner, N. Y., 203 N. Y. S. 421.

7. **Bankruptcy**—Acts of.—Appointment of a receiver for an alleged bankrupt does not constitute an act of bankruptcy under Bankruptcy Act, § 3a (4), being Comp. St. § 9587a (4), unless made because of insolvency.—In re Billy's Ice Cream Co., U. S. C. C. A., 295 Fed. 502.

8.——Bulk Sales Laws.—Bankrupt's sale of a quantity of goods prior to the filing of the bankruptcy petition without complying with Personal Property Law N. Y., § 44, relating to bulk sales, and his payment of the proceeds to certain creditors, even though it might be set aside as a preference, was not a ground for denying bankrupt's discharge; the sale not having been made with intent to hinder, defraud and delay creditors.—In re Angard, U. S. D. C., 295 Fed. 428.

9.——Insurance Policy.—The rule that the bankruptcy court through its officers has constructive possession of choses in action belonging to the bankrupt's estate is applicable only to choses in action consisting of mere debts or demands wholly intangible, and not to choses evidenced by a physical document, such as an insurance policy delivered to adverse claimants by bankrupt prior to bankruptcy.—In re Detroit Waterproof Fabric Co., U. S. D. C., 295 Fed. 338.

10.——Lease.—Where bankruptcy trustee sold bankrupt's interest in an unexpired lease, the bankruptcy court had no further control of the lease, and did not have jurisdiction to restrain the owners of the premises from prosecuting an action in another tribunal to oust assignees of the lease; even if trustee's contention that, if the assignment were found invalid, he would be compelled to return the money received therefrom, were true.—In re Krull, U. S. D. C., 295 Fed. 520.

11.——Liens.—A fully secured lien creditor is not answerable for any of the cost of insurance on the bankrupts property, or for any of the cost of the general administration of the estate.—In re San Joaquin Valley Packing Co., U. S. C. C. A., 295 Fed. 311.

12.——Trust Deposits.—A mere direction by one party to a contract to a correspondent bank to transfer money from its account to the credit of the second party, which was not done, does not amount to an appropriation of any part of the deposit of the first party to the contract, so as to impress the deposit with a trust in favor of the second party, as respects claim against bankruptcy trustee.—In re Pacat Finance Corporation, U. S. D. C., 295 Fed. 394.

13. **Banks and Banking**—Deposits After Insolvency.—To sustain a conviction under Pub. Laws 1921, c. 4, § 85, of an official or employee of a bank for receiving deposits after knowledge of insolvency, the deposits described must have been actually received, and the bank must have been insolvent at the time to the knowledge of defendant.—State v. Hightower, N. C., 121 S. E. 616.

14.——Paying Draft.—Where a letter of credit was issued by a bank for payment of a draft against a shipment of 'Alicante Bouchez grapes" from California against "invoice and negotiable railroad bill of lading," but bill of lading showed merely a shipment of "grapes," held that an invoice which was drawn up in New York after the arrival of the grapes, properly describing them, was not a shipping document, and, as the bill of lading did not properly describe the grapes, payment by the bank after receiving notice not to pay the draft was unauthorized.—Laudisi v. American Exch. Nat. Bank, N. Y., 203 N. Y. S. 432.

15.——Relation of Banks.—Where one bank telegraphed instructions to a second bank to telegraph a specified sum of money to be placed to the credit of a third bank, the relation of the second bank to the first bank as to the funds to be transmitted was that of agent or trustee, and the second bank could only relieve itself of the liability for an appropriation of the fund by following, as agent, the instructions of its principal, the first bank, or,

as trustee, in acting in good faith with first bank as its cestui que trust.—Bacon v. National Bank of Commerce, Tex., 259 S. W. 244.

16.——Right to Collateral.—The circumstance that bonds left with a bank for safekeeping were not in existence at the time of an agreement that the bank could hold any securities coming into its possession as collateral to any loan or indebtedness to the bank did not affect the right of the bank to hold them in accordance with its provisions.—Foster v. Commercial Nat. Bank, Mass., 142 N. E. 767.

17.——Transmission of Money.—A person, who for a consideration undertakes to carry and deliver money as bailee to another in a foreign country, is not a private banker, within Banking Law, § 172, as amended by Laws 1921, c. 350, making the carrying on of a banking business without a certificate from the superintendent of banks a misdemeanor, and providing a penalty therefor; the statute being applicable only to "transmission" of money, as distinguished from carrying or transferring.—People v. Waks, N. Y., 203 N. Y. S. 592.

18. **Bills and Notes**—Fill-In Blank Space.—As between the original parties to a note executed before the Negotiable Instrument Law, the implied authority to fill in the blanks of the note extended so far only as accorded with the terms of the agreement relating thereto.—Dille v. Longwell, Iowa, 197 N. W. 439.

19.——Notice.—Where a bank receives a check payable to a corporation and indorsed by the president of the corporation, so as to make it payable to himself, which is deposited in the personal account of the president with the bank, the bank is chargeable with notice, so as to put it upon inquiry to determine whether the president of the corporation was authorized so to use its funds as against the corporation.—Dennis Metal Mfg. Co. v. Fidelity Union Trust Co., N. J., 123 Atl. 614.

20. **Carriers**—Express Business.—Where the express business of a carrier was handled by an express company which owned its own cars and handled all express shipments, but both companies had the same agent, and the express company operated its cars over the tracks of the carrier, carrier was not liable for the failure of the express company to furnish a shipper an iced refrigerator express car for a shipment of strawberries where the agent, in accepting the order for the car, acted solely for the express company; carrier having nothing to do with the transaction other than setting out the car for the use of shipper.—St. Louis-San Francisco Ry. Co. v. Fruitman's Union, Ark., 258 S. W. 626.

21.——Invitee.—A railway mail clerk whose duty it was to load cars and not to ride on them was not a passenger, but while in the course of his employment of loading and unloading a car stood toward the carrier as an invitee, and did not become a mere licensee where he was locked in the car, which was to be taken away, and endeavored to attract the attention of a brakeman by waving his hand and hollering.—Ward v. New York Cent. R. Co., Mass., 142 N. E. 751.

22.——Spur Tracks.—That carrier, on learning that loaded cars were occupying a portion of defendant's spur track upon which prior shipments had been unloaded, did not offer to place the incoming cars upon other parts of defendant's spur tracks where unloading would have been possible, held insufficient to prevent demurrage, where consignee was promptly informed that carrier considered its use of the spur track as inability to receive new shipments.—Chicago, St. P., M. & O. Ry. Co. v. New Dells Lumber Co., Wis., 197 N. W. 713.

23.——Strike Delay.—On delivery of goods to express company under uniform express receipt exempting the company from liability for damage caused by strikes, the express company on receipt of goods was not required to advise shippers as to the existence of a strike which might cause delay, in the absence of a request for information from shippers, since the shippers were required to make inquiries from carrier as to existence of conditions which might delay shipment.—Feniger v. American Ry. Express Co., Mich., 197 N. W. 550.

24. **Champerty and Maintenance**—Claims Out of State.—Sections 9737 and 9738, Comp. St. 1922, prohibiting the soliciting of certain classes of claims for the purpose of instituting suits thereon outside of the state, and providing a penalty therefor, are regulatory measures, and, as such, do not infringe the rights of an individual under the Constitution of the United States or of this state.—Chicago, B. & Q. R. Co. v. Davis, Neb., 197 N. W. 599.

25. **Chattel Mortgages**—Notice.—Record of a mortgage on "one new Jordan touring car No. 6552" was not constructive notice to an innocent purchaser from the mortgagor, where the number stated in the mortgage was incorrect, and the mortgagor an agent for the sale of Jordan cars.—Wise v. Kennedy, Mass., 142 N. E. 755.

26. **Commerce**—Interstate Commission.—An order of the Interstate Commerce Commission, under Interstate Commerce Act, § 5, par. 2, as amended by Transportation Act 1920 (Comp, St. Ann. Supp. 1923, § 8567), authorizing a railroad company to acquire control over terminal railroads located within the Chicago switching district, is void, and may be set aside by the court, when the commission's finding that such an acquisition will be for the interest of the public is unsupported by evidence.—The Chicago Junction Case, U. S. S. C., 44 Sup. Ct. 317.

27.——Safety Appliance Act.—Where, in an action under federal Safety Appliance Act, plaintiff's claim was stated in the alternative for injuries in interstate or intrastate commerce, and a prima facie case was made out for the latter, a refusal to take off a compulsory non-suit because proof failed to show that plaintiff was injured in interstate commerce was error, since an employee on an interstate railroad engaged in intrastate traffic is within the protection of federal Appliance Act March 2, 1893 (U. S. Comp. St. §§ 8605-8612), as amended by Act March 2, 1903 (U. S. Comp. St. §§ 8613-8615).—Sims v. Pennsylvania R. Co., Pa., 123 Atl. 676.

28.——Stop Interstate Trains.—A state may, by legislative enactment or through the instrumentality of its public service commission, require a railway company to stop its interstate trains at a particular station when adequate local facilities so require.—Mackubin v. Public Service Commission, W. Va., 121 S. E. 731.

29. **Constitutional Law**—Hours of Labor.—Laws N. Y. 1917, c. 535, § 3, prohibiting the employment of females over the age of 16 in connection with any restaurant for more than 6 days or 54 hours of any one week, or more than 9 hours in any one day, or before 6 o'clock in the morning, or after 10 o'clock in the evening of any day, held not to violate the due process clause of the Fourteenth Amendment by depriving employer and employee of their liberty of contract.—Radice v. People of the State of New York, U. S. S. C., 44 Sup. Ct. 325.

30.——Hunting License.—The provisions of chapter 9456 and chapter 9431 of the Special or Local Laws of 1923, requiring, respectively, $10 and $50 license taxes of residents of the state who are non-residents of the said counties, respectively, as a prerequisite to permissible hunting of wild game in such counties within the proper seasons, when residents of the county are required to pay only $1 or $1.25, are violative of the relators' organic rights to equal protection of the laws in the enjoyment of a right to lawfully hunt wild game in the state, which the relators, who are residents of the state, but non-residents of the county, have in common with all the citizens of the state.—State v. Bryan, Fla., 99 So. 327.

31.——Kansas Industrial Courts.—The system of compulsory arbitration of industrial disputes in certain businesses declared to be affected with a public interest provided by Kansas Court of Industrial Relations Act, held to violate the federal Constitution as applied to coal mines.—Dorchy v. State of Kansas, U. S. S. C., 44 Sup. Ct. 323.

32.——Oil and Gas Leases.—Acts 1920, c. 24, §§ 2, 3, relating to oil and gas leases and extending same for a period of one year from completion of well, held invalid as impairing obligation of contracts if applied to leases existing before enactment of statute.—Oil Fork Development Co. v. Huddleston, Ky., 259 S. W. 334.

33. **Corporations**—Act of Bankruptcy.—A corporation did not commit an overt act of insolvency by calling a creditors' meeting for a conference looking to an adjustment of its indebtedness where it continued to be a going concern.—Hicks v. Whiting, Tenn., 258 S. W. 784.

34.——Indemnity Bond.—When the obligor in an indemnity bond delivers such bond to a corporation, as obligee, for its acceptance, and it is apparent from the face of the bond that the obligor is executing said bond upon faith in an agreement therein contained that the bond shall be void unless certain statements are true which it is therein recited have been made by the obligee acting through some one assuming to be its agent, the obligee by accepting the bond ratifies the authority of the assumed agent to make such statements and, as to the obligor, becomes estopped to deny such authority.—Maryland Casualty Co. v. First State Bank, Okla., 223 Pac. 701.

35.——Profit by Officer.—It is an abuse of trust for a corporate director to purchase property which he knows the corporation will need and then sell it to the corporation at an advanced price.—Gilmore v. W. J. Gilmore Drug Co., Pa., 123 Atl. 730.

36.——Receivers.—Where a foreign corporation entered a general appearance in a suit against it for appointment of receivers, and took no appeal from the order appointing receivers, nor from any subsequent order incidental to the conduct of the business by the receivers, which continued for 20 months, during which they contracted debts, but on appeal from a collateral order the court was held without jurisdiction, and directed to dismiss the suit, without further instructions, it will direct an accounting by the receivers and provide for the payment of their indebtedness and compensation from defendant's funds.—Riggs v. Burnrite Coal Briquette Co., U. S. D. C., 295 Fed. 516.

37. **False Pretenses**—Past Consideration.—Under section 710—176, General Code, the making, drawing, uttering or delivering of a check, draft, or order, payment of which is refused by the drawee, is prima facie evidence of the intent to defraud, and the mere fact that the check was given for a past consideration does not justify the court in taking the case from the jury upon the admission of that fact in the opening statement by counsel for the state.—State v. Lowenstein, Ohio, 142 N. E. 897.

38. **Highways**—Pedestrian.—A person pushing a bicycle is a "pedestrian" within the meaning of Laws 1921, p. 273, § 28, Rem. Comp. Stat., § 6340, subd. 7, requiring pedestrians at night to travel along the left side of a highway, and upon meeting an oncoming vehicle to step off the traveled portion thereof.—Benson v. Anderson, Wash., 223 Pac. 1063.

39. **Insurance**—Agent's Insertions.—Where an applicant for an automobile insurance policy gives truthful answers to defendants' agent as to the existence of a mortgage thereon, the motor number, its purchase secondhand, and the price paid, his right to recover on the policy is not affected by the agents insertion of misstatements in the application, unless he had knowledge thereof, and, the policy being a valued one within Rev. St. 1919, § 6239, no forfeiture can be based on lack of value, description of the car as new, or the granting of larger insurance than was granted on cars costing less than the amount stated in the application.—Andrews v. Bull Dog Auto Fire Ins. Ass'n, Mo., 258 S. W. 714.

40.——Exact Sum.—A condition in an assessment insurance policy that, should insured carry other insurance, the insurer would be liable for only such portion of the indemnity promised as it bore to the total amount of like indemnity in all policies covering such loss, held invalid under Rev. St. 1919, § 6157, requiring policies to specify "the exact sum of money" payable upon happening of the contingency insured against; it being insufficient that such "exact sum" might be determined by a mathematical calculation.—State v. Allen, Mo., 259 S. W. 77.

41.——Interest.—The jury returned a verdict finding for the plaintiff "interest from October 30, 1920, at the rate 7 per cent per annum." The petition alleges that the fire occurred on October 30, 1920, and "that upon the destruction of his automobile by fire" petitioner furnished proofs of said loss, gave proper notice, and fully complied with all requirements of the company as to filing notice, etc., on the same day, as we construe the petition. The policy of insurance provides that the sum for which the company is liable shall be payable 60 days after the notice and satisfactory proof of loss. Direction is given that the judgment be so amended that the interest shall be computed as beginning 60 days after October 30, 1920.—Love v. National Liberty Ins. Co., Ga., 121 S. E. 648.

42. **Intoxicating Liquors**—Possession.—The manual act of handling a bottle while taking a drink does not of itself constitute the unlawful possession denounced by statute where the one so doing does not claim ownership or control, "possession" being the "having holding or detention of property in one's own proper or command; ownership whether right or wrongful; actual seizing or occupancy."—Sizemore v. Commonwealth, Ky., 259 S. W. 337.

43. **Municipal Corporations**—City Ordinance.—Neither the Supreme Judicial Court nor the superior court or any court of equity has jurisdiction to entertain a petition by ten taxable inhabitants of a town or city, or by any number of taxable inhabitants, to restrain the violation or to compel the observance of a by-law or ordinances of such town or city.—Kelley v. Board of Health, Mass., 143 N. E. 39.

44.——Contributory Negligence.—Where a woman, 51 years old, and in full possession of her physical and mental faculties, started to cross the street to enter a street car which was below a street intersection, and when half way across came in contact with the rear wheel of a trailer attached to a truck, whereby she was injured, such wheel being over 20 feet behind the front end of the truck, held that she was negligent in failing to observe the approach of the truck which was visible by its size and audible from the noise it made.—Itzkovitch v. Schorling, La., 99 So. 353.

45.——Law Violators.—Persons riding on a double runner sled in a city street contrary to ordinance thereof could not recover for injuries received in collision with automobile negligently driven, the unlawful sliding on the street being a contributing cause, without which the accident could not have happened.—Boyd v. Ellison, Mass., 143 N. E. 41.

46.——Motor Bus to Use Certain Streets.—An ordinance prohibiting operation of motor busses on or across certain streets held not invalid as destroying the business of certain bus companies, where it only required them to use different routes which would take a few minutes more time to cover the distance to other stations.—Waid v. City of Fort Worth, Tex., 258 S. W. 1114.

47.——Motor Bus Furnish Surety.—Highway Law, § 282-b, as added by Laws 1922, c. 612, so as to require operators of motor vehicles as comomn carriers for hire in a city of the first class to secure the payment of any judgments recovered against them for death or personal injuries by a personal bond or a corporate surety bond or an insurance policy, held a valid exercise of the police power of the state.—People v. Martin, N. Y., 203 N. Y. S. 480.

48.——Right of Way.—A pedestrian at an intersection could rightly assume that one of two approaching cars would observe the provisions of G. L. c. 89, § 8, and chapter 90, § 1, and grant the right of way to the other car.—Fraser v. Flanders, Mass., 142 N. E. 836.

49.——Speed of Automobiles.—Under Motor Vehicle Act, §§ 20a, 22a, as amended by St. 1919, pp. 215, 220, prescribing maximum legal speed and requiring that drivers of motor vehicles shall at all times operate in a careful and prudent manner with due regard to the safety of others, the driver of a vehicle unequipped with the amount or character of illumination required by law may not safely proceed at the same rate of speed as he might otherwise.—Garns v. Halpern, Calif., 223 Pac. 545.